

L.A.D. PRESIDENTIAL I, L.P.	:	
and	:	JULY TERM 2003
L.A.D PRESIDENTIAL II, L.P.	:	
	:	NO: 3524
v.	:	
	:	CONTROL NO: 051675
L.A.D. PRESIDENTIAL III, L.P.,	:	
GEORGE A. DAVID, SR.,	:	COMMERCE PROGRAM
and	:	
GEORGE A. DAVID, JR.	:	

AND NOW, this 2ND day of August, 2006 upon consideration of plaintiffs L.A.D Presidential I, L.P. and L.A.D Presidential II, L.P.'s Motion for Attorneys' Fees and Costs, and response thereto, and in accordance with the Court's contemporaneously filed Opinion, it is hereby ORDERED and DECREED that said Motion is DENIED.

HOWLAND W. ABRAMSON, J.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

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and	:	JULY TERM 2003
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OPINION

Procedural History

The original dispute in this case concerned a disagreement over limited parking space for tenants of buildings on a shared site, owned separately by Plaintiffs, L.A.D Presidential I, L.P. and L.A.D Presidential II, L.P., and Defendants, L.A.D Presidential III, L.P. The parties entered into a Declaration of Easements, Covenants and Restrictions (the “Easement Agreement”), dated June 11, 1998, which defined easement rights over driveways and parking lots of the other party’s property and which could be amended only by a writing signed by the parties. Defendants were twice enjoined by this Court from towing Plaintiffs’ tenants’ vehicles from Defendants’ parking lots. After the second injunction, both parties agreed to resolve their dispute through binding arbitration in accordance with the Easement Agreement.

Plaintiffs’ present Motion for Attorneys’ Fees and Costs follows an October 2003 Award of Arbitrator and a December 2003 Supplemental Order by the Arbitrator, both generally in favor of Plaintiffs, including a monetary award of \$58,813.16. This

Honorable Court confirmed the Arbitrator's Award by an Order of this Court dated February 19, 2004. Upon Defendants' appeal, the Superior Court in November 2005 affirmed the Order of this Court and the Arbitrator's Award.

Discussion

Plaintiffs' Motion for Attorneys' Fees and Costs is based on three main arguments. **First**, Plaintiffs argue that the terms of the Easement Agreement provide for an award of attorneys' fees and costs. **Second**, Plaintiffs argue that they are entitled to attorneys' fees and costs in accordance with the rulings of the Arbitrator. **Third**, Plaintiffs argue that this Court has the power pursuant Pa. R.A.P. 2744 to award attorneys' fees and costs because Defendants' appeal of this Court's Order affirming the Arbitrator's Award was frivolous or taken solely for delay.

This Court declines to grant Plaintiffs' motion on three grounds: **First**, Judge Arlin Adams (Ret.), despite finding a basis for fees and costs in the Easement Agreement, expressly declined to grant attorneys' fees and costs. If Plaintiffs wanted to appeal this portion of his Award, they would have had to do so within thirty (30) days of the date of the Award. Because Plaintiffs did not do so, that issue is waived. **Second**, when the Arbitrator declined to grant fees and costs, he did leave the door open for fees and costs if Defendants failed to comply with his findings of fact and conclusions of law. Armed with this arrow, Plaintiffs have not formally commenced execution on the judgment by either following Rule 3103 of the Pennsylvania Rules of Civil Procedure or filing a Petition for Contempt. Plaintiffs' allegation of noncompliance by Defendants is not sufficient for an award of attorneys' fees and costs. **Third and finally**, because this

Court is not a court of appeals and Plaintiffs are seeking an award for costs by relying upon Rule 2744 of the Pennsylvania Rules of Appellate Procedure, this Court may not grant relief as sought by Plaintiffs. The Superior Court declined to award fees and costs on the grounds that the appeal was frivolous. Rule 2744 only grants Plaintiffs the ability to seek costs in an appellate court if an appeal is frivolous, but not in the trial court.

I. Arbitrator's Award Declined to Award Attorneys' Fees and Costs Based on the Easement Agreement

Plaintiffs first argue that they are entitled to an award of attorneys' fees and costs based on the 1998 Easement Agreement¹. Plaintiffs state that because they were the prevailing party, they are entitled to an award of attorneys' fees and costs. See Plaintiffs' Motion p. 4. The Arbitrator, however, clearly declined to award attorneys' fees and costs based on the Easement Agreement.² His Award, as a product of common law arbitration, is binding. The law provides that:

The award...is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award.

¹ The relevant portion of the Easement Agreement is section 7.5(b)(iii):

- (iii) The nondefaulting Owner may bring an action at law against the Owner and Occupant... In the event of such litigation **there shall be added** to the amount of such payment interest on the subject payment as above provided, **reasonable attorney's fees, and the costs of the action.** (emphasis in Plaintiffs' motion)

² The Arbitrator's Award states in relevant part that "[a]lthough there is a basis in the Easement Agreement for the imposition of counsel fees and sanctions, the Arbitrator declines to impose such counsel fees of sanctions." See Arbitrator's Award dated October 29, 2003, page 5, Plaintiffs' Motion Exhibit A.

42 Pa. C.S.A. § 7341. Further, it is well settled in Pennsylvania that if a party wishes to challenge an Arbitration Award, an appeal must be made in the Court of Common Pleas within 30 days of the date of the Award. See 42 Pa.C.S.A § 7342(b); Snyder v. Cress, 2002 Pa. Super. 28, 791 A.2d 1198, 1201 (2002). Otherwise, any such appeal is waived.

Plaintiffs have not asserted that fraud, misconduct, or irregularity resulted in an unjust Award. Quite to the contrary, when Defendants attempted to appeal Judge Adams' Award, Plaintiffs argued that no fraud, misconduct, or irregularity led to an unjust Award. See L.A.D. Presidential I, L.P. and L.A.D. Presidential II, L.P.'s Response to L.A.D. Presidential III, L.P.'s Petition to Vacate Arbitration Award p. 11, filed December 16, 2003. In fact, Plaintiffs filed a Motion to Enter the Arbitration Award without asserting that Judge Adams' Award was decided incorrectly on the issue of attorneys' fees and costs based on the Easement Agreement. See Id. Plaintiffs may not now, over two years after the date that Judge Adams' Award was entered, assert an appeal as to his Award, which declined to award attorneys' fees and costs based on the Easement Agreement. That issue is waived.

II. The Arbitrator Left the Door Open for Attorneys' Fees and Costs

In his Award, the Arbitrator left open the door for the plaintiff to collect attorneys' fees and costs if Defendants failed to comply with his Findings of Fact and Conclusions of Law³. If Defendants are in contempt of the Arbitrator's Award,

³The Arbitrators Award states in relevant part that "[a]lthough there is a basis in the Easement Agreement for the imposition of counsel fees and sanctions, the Arbitrator declines to impose such counsel fees of sanctions. However, if [Defendants] do not adhere to the findings of fact and conclusions of law contained in this adjudication and order, the Court of Common Pleas where this Opinion and Order are filed may proceed to impose appropriate counsel fees and sanctions." See Arbitrator's Award dated October 29, 2003, page 5, Plaintiffs' Motion Exhibit A.

Plaintiffs' first step towards enforcement of Judge Adams' monetary award is a Praecipe for Writ of Execution. Rule 3103 of the Pennsylvania Rules of Civil Procedure provides:

**ENFORCEMENT OF MONEY JUDGMENTS FOR THE PAYMENT
OF MONEY**

Rule 3103. Commencement. Issuance

(a) Execution shall be commenced by filing a praecipe for a writ of execution with the prothonotary of any county in which judgment has been entered. Except as otherwise prescribed by Rule 2963 governing a judgment entered by confession, the praecipe shall be in the form prescribed by Rule 3251.

Pa. R.Civ.P. 3103. Further, before a party may seek attorneys' fees and costs associated with or as a sanction for contempt of an equitable award, a Petition for Contempt must be filed with the Court and that party must prevail.

Plaintiffs have filed neither a Praecipe for Writ of Execution or a Petition for Contempt based on Defendants' failure to comply with Judge Adams' Award. Without enforcement proceedings as to the Arbitrator's Award, there can be no attorneys' fees or costs awardable by way of such proceedings.⁴ This Court declines to award attorneys' fees and costs on the basis of the pending motion as a means of funding the prosecution of award enforcement proceedings. This would be sublime.

III. The Superior Court Left the Door Open for Costs

The Pennsylvania Superior Court denied Plaintiffs' Motion for Attorneys' Fees and Costs on the ground that Defendants' appeal was frivolous⁵. In their instant Motion,

⁴ The Court need not decide the universe of fees and costs which may be obtained through Judge Adams' Award. The matter is not ripe for disposition.

⁵ The Superior Court decision in relevant part states that "[w]e deny [Plaintiffs'] application for attorney's fees and delay damages on appeal in the form of a sanction on the ground that the appeal was frivolous.

Plaintiffs rely solely on Rule 2744 of the Pennsylvania Rules of Appellate Procedure.

The rule provides as follows:

Further Costs. Counsel Fees. Damages for Delay

In addition to other costs allowable by general rule or Act of Assembly, an *appellate* court may award as further costs damages as may be just, including

(1) a reasonable counsel fee and

(2) damages for delay at the rate of 6% per annum in addition to legal interest,

if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The *appellate* court may remand the case to the trial court to determine the amount of damages authorized by this rule.

Pa. R. App. P. 2744 (emphasis supplied). The rule specifically sets out that an *appellate* court may award the costs, and that an *appellate* court may remand the case to the trial court to determine these damages. But the appellate court here, the Superior Court, did neither of these things. They did not award costs, but rather left it open for Plaintiffs to seek further costs pursuant to Rules 2741-2771 of the Pennsylvania Rules of Appellate Procedure. Additionally, the Superior Court did not remand the case to this Court to determine such costs. As such, Plaintiffs' reliance on Rule 2744 to seek such costs is invalid.

Conclusion

Our decision to deny [Plaintiffs'] request is without prejudice to their right to seek costs in the trial court as the prevailing party on appeal, pursuant to Rules 2741-2771 of the Pennsylvania Rules of Appellate Procedure." See Pennsylvania Superior Court Decision, dated November 7, 2005, Plaintiffs' Motion, Exhibit C.

This Court declines to grant Plaintiffs' Motion for Attorneys' Fees and Costs. The Court does so for three reasons. **First**, Judge Adams declined to award attorneys' fees and costs based on the Easement Agreement. Plaintiffs did not appeal this decision within their thirty day window of opportunity. Therefore, that argument is waived. **Second**, Plaintiffs' have not filed a Praecipe for Writ of Execution in accordance with Rule 3103 of the Pennsylvania Rules of Civil Procedure, nor have they filed a Petition for Contempt based on Defendants' noncompliance, so no attorneys' fees or costs can be attributed to such actions. **Third and finally**, Plaintiffs rely on Rule 2744 of the Pennsylvania Rules of Appellate Procedure in seeking costs before this Court. Because this is not an appellate court, and because the Superior Court declined to either award such costs or remand the case to this Court to find such costs, this Court may not award such costs by way of Rule 2744.

For the forgoing reasons, Plaintiffs' Motion is DENIED.

BY THE COURT,

HOWLAND W. ABRAMSON, J.